

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

PATRICIA MCGINN

Claimant

VS.

BINNEY & SMITH, INC.

Respondent

AND

BINNEY & SMITH, INC.

Insurance Carrier

AND

KANSAS WORKERS COMPENSATION FUND

Docket No. 168,770

ORDER

ON April 12, 1994, the respondent's application for review of an Order of Administrative Law Judge Shannon S. Krysl dated February 15, 1994, came on for oral argument.

APPEARANCES

The claimant appeared by and through her attorney, Dale V. Slape, of Wichita, Kansas. The respondent and its insurance carrier appeared by and through their attorney, John D. Jurcyk, of Lenexa, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney, J. Philip Davidson, of Wichita, Kansas. There were no other appearances.

RECORD

The record considered for purposes of this appeal includes the transcript of the preliminary hearing of November 16, 1993, and exhibits attached; the transcript of the preliminary hearing of February 8, 1994, and exhibits attached; as well as all pleadings filed of record and previous orders entered by the Administrative Law Judge.

ISSUES

By the appealed order, the Administrative Law Judge required respondent to pay for certain outstanding medical bills. On appeal the respondent contends that that order exceeded the jurisdiction of the Administrative Law Judge for the following reasons:

- 1) The injuries for which the medical treatment is ordered are not ones which resulted from accidental injury arising out of and in the course of claimant's employment;
- 2) The Administrative Law Judge exceeded her jurisdiction by ordering respondent and its insurance carrier to pay \$180.00 for two swim suits;
- 3) The hearing of February 14, 1994, was in effect, a rehearing in violation of K.S.A. 44-534a and related case law;
- 4) The order exceeds the jurisdiction of the Administrative Law Judge because it improperly treats as authorized certain medical expenses which were not, at the time, ordered by an authorized treating physician; and
- 5) The Administrative Law Judge exceeded her jurisdiction by, in effect, ordering respondent to pay in excess of \$350.00 in unauthorized medical expenses.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Because this is an appeal from a preliminary order, the jurisdiction of the Appeals Board is limited. The Appeals Board may consider only those threshold issues which go to the jurisdiction of the Administrative Law Judge. See K.S.A. 44-551 and K.S.A. 44-534a. The issues raised by respondent must be considered in light of this scope of review. The issues raised must also be placed in the context of the several hearings conducted and orders issued.

Claimant has alleged that she suffered injuries in the course of her employment on July 22, 1992. On May 20, 1993, apparently immediately prior to a scheduled preliminary hearing, the parties agreed to an order for payment of medical benefits authorizing Dr. Lesko to act as the treating physician. This order was limited to treatment for the shoulder and arm. After change of counsel and amendment to the application for hearing, a second preliminary hearing was held on November 16, 1993. At the November hearing the issue to be determined was whether the respondent should be required to provide medical treatment for lumbar and cervical spine injury. After testimony of the claimant and review of medical records, the Administrative Law Judge entered an order authorizing Dr. Lesko and Dr. Klawns to provide future conservative treatment for the neck and back. No mention is made in that order of the then outstanding medical bills for treatment to the claimant's neck and low back. Claimant then made a third application for preliminary hearing and a third hearing was held on February 8, 1994. At this third hearing claimant requested an order for respondent to pay medical expenses incurred for the treatment to the low back and neck prior to the November 16, 1993, preliminary hearing. This hearing consisted primarily of argument by counsel and the only additional evidence was introduction of the medical bills and correspondence relating to those bills. The Administrative Law Judge did, following that hearing, order respondent to pay those medical bills, including the bills for two swim suits which Dr. Lesko had prescribed for use in physical therapy.

Respondent first contends that the claimant's neck and back injuries are not shown to have arisen out of and in the course of her employment. This is an issue which the Appeals Board would normally review on appeal from a preliminary order. See K.S.A. 44-534a. This appeal is, however, from the hearing of February 8, 1994. The determination regarding compensability of the low back and neck injuries was made at the November

1993 hearing. No appeal is taken from that decision. No new evidence was presented on the issue at the February 8, 1994, hearing. Because no new evidence was presented and the issue was not re-decided at the February 8, 1994, hearing, the Appeals Board considers the appeal from the determination of compensability to be out of time.

Respondent next argues that the Administrative Law Judge exceeded his authority by requiring payment for two swim suits. The record reflects Dr. Lesko recommended therapy done in a pool and wrote a prescription for the two swim suits. The appropriateness of this order is not one subject to review on appeal from a preliminary order. The Kansas Workers Compensation Act requires respondent to provide health care services, including medical supplies and apparatus. In a compensable case the Administrative Law Judge has jurisdiction to determine what is necessary to satisfy this requirement and order that it be provided. The order requiring payment for the two swim suits does not exceed the jurisdiction of the Administrative Law Judge and is not subject to review on appeal.

Respondent also argues that the preliminary hearing was, in effect, a rehearing in violation of statute and case law. Specifically, respondent cites several decisions holding that there is no procedure in workers compensation law for rehearing. In support of this position respondent cites Waln v. Clarkson Constr. Co., 18 Kan. App. 729, 861 P.2d 1355 (1993) and Lively v. MBPXL Corp., 7 Kan. App. 2d 204, 638 P.2d 999 (1982). Both cases stand for the general position that the Kansas Workers Compensation Act contains its own exclusive procedures and hearings are limited to those expressly provided for in the Act. Neither case, however, involves a preliminary hearing. The Lively decision was an attempted appeal from a preliminary hearing. That appeal was denied, in part, because there were no procedures for appeal to the District Court. The Waln decision involves an order assessing penalties. As the Court states in that decision, procedures for penalties are considered to be separate proceedings. The Court then does state that in the absence of provision for rehearing of an order granting or denying penalties there is no right to a rehearing of such an order. The Waln decision cites as precedent a previous decision by the Kansas Supreme Court in Norcross v. Pickrell Drilling Co., 202 Kan. 524, 449 P.2d 569 (1969). In that case the Kansas Supreme Court held that there is no right to a rehearing from a final award.

The Appeals Board does not consider these decisions to be controlling of the question here. From the February 8, 1994, hearing, respondent was required to pay for treatment to the neck and back rendered prior to the November 16, 1993, hearing. This was not an issue expressly addressed in the November 16, 1993, hearing or the subsequent order. For two reasons, the Appeals Board concludes the decision of February 8, 1994, did not violate case law relating to rehearings: 1) This is a preliminary hearing and there is no statutory or other limit to the number of preliminary hearings that might be held; and 2) it was not a rehearing of an issue already decided. The Appeals Board therefore finds the decision did not exceed the Administrative Law Judge's jurisdiction.

The final two contentions are ones which the Appeals Board does not consider to raise appealable issues. Respondent contends first that the decision of the Administrative Law Judge improperly converts unauthorized to authorized medical expenses and second, that it, therefore, amounts to an order requiring respondent to pay in excess of the statutory limit of \$350.00 in unauthorized medical expense. An Administrative Law Judge clearly has the authority to require a respondent to pay medical expenses which the respondent had not agreed to pay. This includes authority to order payment of medical expenses incurred prior to a preliminary hearing which the respondent has declined to pay. Doing

so does not affect the unauthorized medical expense limits. It amounts to a determination that they will be treated as authorized. The Administrative Law Judge need only find they are reasonably necessary medical expenses. That is a decision which the Administrative Law Judge has jurisdiction to make and not one which will be reviewed on appeal. Having found the injuries to be compensable, the Appeals Board considers that decision within the jurisdiction of the Administrative Law Judge and accordingly not subject to review.

For the above and foregoing reasons the Appeals Board hereby affirms in all respects the Order of Administrative Law Judge Shannon S. Krysl dated February 15, 1994.

AWARD

WHEREFORE, it is the finding, decision and order of the Appeals Board that the Order of Administrative Law Judge Shannon S. Krysl dated February 15, 1994, is hereby affirmed in all respects.

IT IS SO ORDERED.

Dated this _____ day of June, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc: Dale V. Slape, 1356 N Emporia, Wichita, Kansas 67214
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Shannon S. Krysl, Administrative Law Judge
George Gomez, Director